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Semantics of the verb *shall* in legal discourse

The article deals with the modal verb *shall* in English legal discourse. The analysis of theoretical and factual data shows that *shall* performs a number of semantic functions in legal texts that violate the main drafting requirements – clarity, precision, lack of ambiguity of legal utterances. Lexical units and grammatical constructions with ambiguous meanings obscure legal provisions for lay persons, so their use goes against one of the main principles of the rule of law – equitable access to legal information for all citizens, not only for legal experts. Furthermore, the ambiguity of linguistic units involves considerable difficulties for legal translators as they need to have deep legal knowledge in order to interpret unclear intentions of legislators. The article examines three approaches developed in law-making practice to the use of *shall* in legal documents: restricting *shall* to one sense, avoidance of *shal*, and keeping the verb with all its existing meanings. The analysis showed that in legal discourse *shall* may be replaced by other modal verbs – *may*, *must*, *should*, *be to* with less ambiguous meanings.

Key words: legal discourse; modal verb; meaning; semantic function; plain language.

1. Introduction

This paper is a study of the semantic roles of the modal verb *shall* considered as the most misused word in legal language, paying attention to its use in the general language. It discusses the issues of the use of *shall* in legal acts related to the ambiguity of its meaning which is considered to be against the rules of drafting techniques. As a result of the study, it was concluded that the use of *shall* in legal English is none other than an archaism which causes interpretation problems for legal specialists, translators, and lay readers.



One of the main principles of legislation is clarity. It should be understandable not only for professional lawyers, but for the lay audience as well. Clear and precise language of legal discourse is the basis for lawmakers who should avoid using lexical units and grammatical constructions with obscure or duplicate meanings. The verb *shall* is one of them: it is used to express obligatory and mandatory actions, requirements, prohibitions, permissions, future actions, etc. Different meanings of *shall* cause not only discussions among researchers and lawyers, but are touched upon in judicial decisions (Jefferson Union Sch. Dist. v. City Council 1954; People v. Reiley 1987; Vale v. Messenger 1918).

The roles of the modal verb *shall* in legal texts have been analyzed and discussed by lawyers, linguists and legal translators. Cooper (2001) devoted to this issue a research paper where he examined the lack of precision caused by legislative drafters in using the verb *shall*. Other main contributors to the issue of *shall* in legal discourse are Foley (2002), Williams (2008, 2011), Aitken and Butt (2004), Bennion (1979). All of them attempted to find out the semantic functions of *shall* in legal sphere. Some researchers conducted text analysis of legal and non-legal texts to compare *shall*-use. For example, based on the text analysis of the *Texas Criminal Code* and *Bridget Jones' Diary* the Czech researchers Bázlik and Ambrus (2009: 65) reported that *shall* is “the verb with the highest frequency in legal English, and the second least frequent in the non-legal settings”. Analyzing the functions of *shall* in legal discourse, Williams (2011: 140) provides examples of ritualistic uses of the verb, where *shall* adds “legalistic flavor.”

The ambiguity of *shall* in a legal setting is emphasized by most researchers. For example, Triebel (2006: 9) says that *shall* is used both to express obligation and imply futurity thus creating ambiguity. Wydick (1998) named *shall* “the biggest troublemaker” for legal experts and courts. Garner (1995: 939) argues that *shall*-use violates principles of good drafting as the verb has diverse meanings which can shift even within a single sentence. In his research, Garner identified the main approaches to *shall*-use by legal drafters (*see below*).

The ambiguity of the verb *shall* and its inconsistent use in legal English attracts the attention of reformers of legal language in the English-speaking world and the European Union. The proponents of the Plain Legal English Movement aim to modernize the legal language and do away with the linguistic elements that make legal English old-fashioned, convoluted, and hard for non-experts to understand (Williams 2011: 139). Replacing *shall* with *must* or *is/are to* is one of their proposals.



The present study aims to summarize the semantic functions of *shall* in legal discourse that would be useful for legal translators from English as there is no consensus in Translation theory and practice for the semantic roles of *shall* in legal documents: whether *shall* should be rendered as a future form, an obligation, permission or be omitted is still an issue.

All the legal utterances cited in the main body have been extracted from the legal texts (statutes, treaties and contracts) included in the Corpus. The texts were chosen for randomly selected legislative acts, international treaties and contracts available at legal web sites. Based on comparative and analytical methods, the paper deals with occurrences and meanings of *shall* in General English and legal discourse aiming to conclude on the semantic characteristics of the verb in legal settings. The main focus of the research is on the semantic variety of the verb *shall* which involves difficulties for lawyers. To identify the meanings of *shall* in legal discourse, we also used the data of previous researches on the issue (Bennion 1975; Garner 1995; Aitken and Butt 2004; Thornton 2005; Triebel 2006; Williams 2011; Martorana 2012).

2. *Shall* in General English

Shall is a “double-faced” word as it serves as a modal verb expressing a number of modal meanings, and at the same time it is a tense marking auxiliary. Its meanings always arouse discussions among researchers.

Let us examine the semantic roles of *shall* in General English. In General English, *shall* typically expresses the future, however it can fulfill a number of other semantic roles:

1. *shall* can be used to refer to the future to express prediction. It is used with the first person while *will* is used with the second and third persons:

(1) *I'm afraid I **shall** be late.*

It is interesting to note that the distinction between *shall* and *will* as future markers arose from the practice of Latin teaching in English schools in the 14th century (Merriam Webster's Dictionary of English Usage 1989). *Will* was used to render the Latin *velle* (meaning *to wish, want*); *shall* – to render the Latin future tense. In Modern English, *shall* is traditionally used only in the first person (*I shall* and *we shall*).

It should be noted that nowadays *shall* is rarely used as a future marker giving way to the verb *will*. Swan (1995) and Allen (1999) argue that British people tend



increasingly to use *will* instead of *shall* to express futurity. McArthur (1992) says that the use of *shall* to indicate future time orientation is particularly common only in Southern England. According to Swan (1995), Allen (1999) and Murphy (1997), in American English, *shall* is even more rarely used. Parrott (2000) observes that some teaching materials omit reference to the question form of *shall* altogether.

2. *shall* expresses permission or compulsion:

(2a) *She shall go to the holidays.*

(2b) *You shall do as I say.*

The latter use implies emotional overtones, and the addressee's will is entirely subservient to that of the speaking subject. It marks an impolite use.

3. *shall* is used to express willingness on the part of the speaking subject in the second and third persons:

(3a) *He shall get his reward.*

(3b) *You shall do exactly as you wish.*

4. *shall* is used in making offers or suggestions or posing questions that require confirmation or advice:

(4a) *Shall I help you?* (offer)

(4b) *Where shall I go for my holidays?* (suggestion)

(4c) *Shall we do it together?* (question requiring confirmation)

In these meanings, *shall* is the only option in both American and British English.

5. *shall* is used in creating obligations and duties:

(5) *I shall do it for you.*

To express obligation, *shall* can go with the second and the third person pronouns/nouns.

6. *shall* may be used to imply a command, promise or threat made by the speaker:

(6a) *You shall regret it before long* (threat)

(6b) *You shall not move!* (command)

(6c) *You shall go to Paris* (promise)



3. *Shall* in legal discourse

In contrast to its use in General English where “*shall* half survives in old fashioned uses” (Allen 1995), in legal discourse the verb is frequently used making trouble for legal interpreters, drafters, translators, and lay persons.

Shall is considered as a dominant force in legal drafting, a stylistic feature of legal language. The UK Drafting Techniques Group acknowledged that “few other words have the potential to evoke such strong feelings among writers on legal drafting. *Shall* is the hallmark of traditional legal writing. Whenever lawyers want to express themselves in formal style, *shall* intrudes” (UK Drafting Techniques Group 2008: 1).

Shall has both supporters and opponents. The latter recommend to avoid it in legal drafting or at least limit its meanings to one sense. The former argue that *shall* is “simply too precious a commodity to discard in the absence of an obvious modern equivalent, however archaic it appears” (ibid.).

As far as *shall* is a polysemous word in legal writing, let us examine its functions:

1. *Shall* can be used to impose a legal duty or obligation:

(7) *Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.*

It is interesting to note that in technical settings, where *shall* is rather common, it has similar meanings. In specifications of International Organization for Standardization, International Electrotechnical Commission, American Society for Testing and Materials, requirements with *shall* are the mandatory requirements, meaning *must* or *have to* (ISO/IEC Directives 2011). On specifications and standards published by the United States Department of Defense, requirements with *shall* are also the mandatory requirements (Defense and Program-Unique Specifications):

(8) *If a PIN is need, its construction shall be provided by the DoD activity requiring it.*

Due to the Plain Legal English Movement, in the meaning of imposing a duty or obligation, *shall* is increasingly being supplanted by *must* because of ambiguity of *shall*. However, *must* is not universally accepted, despite its advantage in being unambiguously imperative (Henderson). Some argue that *must* refers to an existing obligation imposed elsewhere, whereas *shall* indicates an obligation being created



by the words themselves. Some argue that *shall* is to be used for stronger obligations than *must*: *must* is reserved for requirements attached to optional activities whereas *shall* – for compulsory activities. Others find *must* more forceful than *shall*: *must* has an underlying impertinence, and *shall* records what a person is required to do (ibid.). According to the note by the Office of the Parliamentary Counsel's Drafting Techniques Group, in legal texts "*must* has the same meaning as *shall* but 'is clearer, more modern and more consistent with Plain English drafting. There is no real argument that *must* is weaker (or stronger) than *shall*, or that it should be used for directory as opposed to mandatory obligations ... *Must* is the clearest and most concise current alternative" (UK Drafting Techniques Group 2008: 9).

2. *Shall not* is used to express prohibition:

- (9) *A corporation, firm, or person, and its or his agents or employees **shall not issue, sell, pledge, assign, or transfer** any receipt, certificate, or other written instrument.*

According to Bázlik and Ambrus (2009: 65) *shall* often expresses prohibition in the negative form, roughly corresponding to the meanings of *must not* (prohibition).

3. *Shall* is used in the sense of 'has the right to', to give permission. In that sense, the meaning of *shall* is closely aligned to *may* (Aitken and Butt 2004):

- (10) *Pending the election of the first Conseil acadien, the Governor in Council **shall appoint** the members of the Conseil acadien.*

Imperative, mandatory and permissive meanings of *shall* have been mentioned in the fifth edition of Black's dictionary (1983: 1081):

As used in statutes and similar instruments, this word is generally **imperative and mandatory**; but it may be construed as merely **permissive or directory** (as equivalent to 'may,') to carry out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense.

4. *Shall not* is used to deny permission (meaning *may not*):

- (11) *Such time **shall not be further extended** except for cause shown.*

5. *Shall* can be used in commissive speech acts (in contracts) when the speaking subjects commit to do something, announcing their intentions:



- (12) *Borrower **shall have performed and complied** with all terms and conditions required by this Agreement to be performed or complied with.*

Williams (2011) observes that *shall* features regularly in contracts. According to Martorana, (2012) contracts are littered with *shall* which is overused in this type of legal texts.

6. *Shall* is used to denote a precondition:

- (13) *No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, **shall be eligible** to the Office of President.*

7. *Shall* can have a directory meaning:

- (14) *Any person bringing a malpractice claim **shall**, within 15 days after the date of filing the action, file a request for mediation.*

8. *Shall* performs a stylistic function just being an element of bureaucratic language. Stylistic cases of *shall* are frequently found in definitions or in introductory parts of legislative acts:

- (15) *For purposes of this section, the term "state agency" **shall** include any state board, commission, bureau, or division created pursuant to the provisions of the Business and Professions Code ...*
- (16) *This Act **shall** be known as THE PENAL CODE OF CALIFORNIA, and is divided into four parts...*

All these uses have a stylistic effect. *Shall* in these utterances is used to give ‘a legal feeling’ to the texts. However the researcher believes that “stylistic uses of *shall* pose a risk to transparency in that the reader may construe them as imposing obligation where none is intended” (Foley 2000: 366).

9. *Shall* can perform a declarative function:

- (17) *Any other law in force immediately before the commencement of this Act **shall** cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.*

10. *Shall* has no deontic force and is used in its temporal meaning:

- (18) *The abstracts of Schedule 1 and of Schedule 2 which are annexed to this Act **shall have effect** as part of this Act.*

Thornton (2005) and Triebel (2006) state that *shall* should not be used to refer to



the future as it is against the rule according to which the law is ‘always speaking’ and is to be treated as the current law no matter when it was enacted (Bennion 1975).

Drafting rules in many English-speaking countries prescribe eliminating the use of *shall* in the future tense. For example, Illinois Drafting Manual says that “an Act should generally be written in the present tense. When an Act is applied years after it becomes law, it is something that speaks then and there.”

Sometimes *shall* is used in its temporal meanings in contracts:

- (19) *If the Contractor’s applicable established price is increased after the contract date, the corresponding contract unit price **shall be increased**.*

Here *shall* is used incorrectly as it refers to the future.

Thus, we see that the verb *shall* is semantically diverse, performing a number of functions in legal discourse. Semantic diversity of *shall* contradicts one of the main principles of legal drafting – clarity of language, lack of obscurity and ambiguity. Because of its trouble-making, chameleon-hued nature in legal settings, *shall* is constantly discussed by researchers and drafters. There are three main approaches to the use of *shall* in legal discourse summarized by Garner (1995):

1. Restriction of the meaning of *shall* to one sense – ‘has a duty to’.
2. Abolitionist approach.
3. Keeping all existing meanings of *shall* in legal discourse.

With regard to the first approach, *shall* should mean only ‘has a duty to’, and *must* – ‘is required to’ (Garner 1995). This approach can be found in the Report to Congress of the Congressional Research Service which says that “use of *shall* and *may* in statutes mirrors common usage; ordinarily *shall* is mandatory and *may* is permissive (Statutory Interpretation: General Principles and Recent Trends 2008). In the guidelines of the International Labor Office, it is stated that *shall* is used for obligations, *should* – for recommendations, and *may* – to allow discretion (Manual for drafting ILO instruments 2007). The Drafting Style Manual of Alabama prescribes to use *shall* to denote a duty, obligation, requirement, or condition precedent, and *may* – to confer a power, privilege, or right. In order to eliminate the ambiguity of the meaning of *shall*, Dickerson (1990) recommends to use *shall* to create a duty or prohibition, and *must* – to create a requirement. Very detailed recommendations to drafters can be found in Indiana Drafting Manual:

To create a right, say *is entitled to*.

To create discretionary authority, say ‘*may*’.



To create a duty, say *shall*.

To create a condition precedent, say *must*.

To negate a right, say *is not entitled to*.

To negate discretionary authority, say *may not*.

To negate a duty or a mere condition precedent, say *is not required to*.

To create a duty not to act, say *shall not* (Indiana Drafting Manual, 1999).

Thus, we can see that most drafting manuals restrict the meaning of *shall* in legal setting to one sense – *has a duty*.

There are a number of proponents of this approach among the researchers as well. For example, Triebel (2006) recommends not to use *shall* for any purpose as it is simply too unreliable. Garner (1995) argues that legal drafters cannot be trusted to use the word *shall* under any circumstances. This approach is common in Australia and New Zealand where legal drafters avoid using *shall* in legislative documents (Cooper 2011).

With regard to the third approach, it is common in the EU where the instances of *shall* in regulatory texts are very frequent. Williams (2008: 5) observes that in the English version of the EU Constitution of 2004, *shall* is the fifth most commonly used term in the entire text, occurring more frequently than the indefinite article. In Schengen Agreement, we have found 52 occurrences of *shall*. *Shall* have been found in almost all articles of the Treaty Establishing a Constitution for Europe. In the Maastricht Treaty we have found 1156 (2.538% of all words) and in the Treaty of Amsterdam – 1139 (2.508% of all words) occurrences of *shall*. According to Bhatia (1993: 101–102), “adherence to tokens of legalese such as *shall* not only sustains the myth of precision in legal language but also perpetuates a style and language that differentiates the genre from that of other professions”.

4. Conclusion

This study was aimed to analyze the semantic roles of the verb *shall* in legal discourse, touching upon its functions in the general language. As a result of the study it was found that:

- 1) *shall* is very rarely used by native speakers of English, and many teaching books have no reference to the verb. *Will* is used to refer to the future with all persons;
- 2) in General English, *shall* is used to express willingness, obligation, make offers or suggestions, express persistence, imply a command, promise or threat;



3) in contrast to its use in General English, *shall* is frequently used in legal discourse;

4) in legal English, *shall* performs a number of semantic roles. It is used to create a right, a duty, a precondition, a requirement, a prohibition; it can perform declarative or stylistic functions, or be used in its temporal meaning;

5) the semantic diversity of the verb *shall* causes ambiguity, lack of precision, fuzziness of legislative provisions for legal specialists, translators and lay persons;

6) the English language has a number of alternatives to the verb *shall* which have more precise and less ambiguous meanings – *must*, *may*, *should*, *may not*, *must not*, *is/are to*, *is/are entitled to*, etc.

7) in legal drafting theory and practice, there exist three approaches concerning the verb *shall*: restricting the meanings of *shall* to one sense; avoiding *shall* in legal writing; keeping all existing meanings of *shall* in legal texts.

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ZNAČENJE GLAGOLA *SHALL* U PRAVNOM DISKURSU

Članak se bavi modalnim glagolom *shall* u engleskom pravnom diskursu. Analiza teoretskih i matrijalnih podataka pokazuje da *shall* ima niz semantičkih funkcija u pravnim tekstovima koje su u sukobu s glavnim zahtjevima pri sastavljanja dokumenata – jasnoćom, preciznošću, izostankom dvoznačnosti. Za laike su zakonske odredbe koje sadrže višeznačne leksičke jedinice i gramatičke konstrukcije nejasne te je njihova poraba nespojiva s glavnim temeljima vladavine prava – pravu na pristup pravnim informacijama za sve građane, a ne samo za pravne stručnjake. Nadalje, višeznačnost jezičnih jedinica predstavlja poteškoće za pravne prevoditelje jer trebaju posjedovati veliko pravno znanje kako bi prikladno preveli namjere zakonodavaca. U članku se razmatraju tri pristupa u zakonodavnoj praksi glede uporabe glagola *shall* u pravnim dokumentima: ograničenje značenja glagola



na samo jedno značenje, njegovo izbjegavanje te uporaba svih njegovih značenja. Analiza je pokazala da se glagol *shall* može zamijeniti drugim, manje višeznačnim modalnim izrazima – *may*, *must*, *should* i *be to*.

Ključne riječi: jezik prava; modalni glagol; značenje; semantička funkcija; obični jezik.